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In the

Supreme Court of the United States

October Term, 1940.

No. 35.

KANSAS CITY, MISSOURI, a Municipal Corporation,
Petitioner,

vs.

L. SINGER & SONS ET AL., *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Petitioner Kansas City, Missouri, has filed its brief in this case. The answer brief of respondent Union Pacific Railroad Company, filed in opposition thereto, brings forward for the first time a new contention which petitioner thinks is clearly untenable. It is to this new contention solely that petitioner addresses this argument. Petitioner's original brief, it feels, sufficiently covers all other questions involved in this case.

I.

Respondent's new contention.

Respondent Union Pacific Railroad Company, at page 15 of its brief (Case No. 35), raises for the first time the contention that "The order of the District Court denying petitioner's motion to intervene is not appealable."

This, says respondent, is true because the refusal of the District Court to permit intervention was a pure exercise of discretion which did not adjudicate any of the petitioner's rights and the order of that court was not a final adjudication. Respondent Union Pacific Railroad Company then argues that any right petitioner might have had against respondent was neither lost nor prejudiced by the order denying intervention, and, therefore, the ruling against petitioner was not in the nature of a final adjudication, and thus the Circuit Court of Appeals had no jurisdiction to review the ruling under Section 225 of Title 28, U. S. C. A., which provides for appeals only from a final adjudication.[1] Respondent then says that although the District Court may have assigned the wrong reason for giving the ruling, and the United States Circuit Court of Appeals for the Eighth Circuit may have assigned the wrong reason for upholding the ruling, the ruling must nevertheless stand.

A review of the record of this case and an analysis of the action of the two lower courts and of respondent will immediately reveal that respondent's position is untenable. It is now for the first time that respondent is urging

[1]Section 225 of Title 28, U. S. C. A., provides that:

"The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal final decisions—

First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

this new contention. The contention is but an afterthought which is wholly inconsistent with respondent's previous theory of the case and with the treatment of the case by both respondent and the two lower courts. Not only is it inconsistent with the theory and treatment of the case as expressed by respondent and both lower courts, but also respondent by having failed to brief, argue and present the question to the intermediate appellate court, and by having failed to present it to this Court in its brief in opposition to petitioner's petition for writ of certiorari, has placed itself upon record that the contention is not in this case, and hence respondent cannot inject it into this case at this stage of the proceeding.

II.

The ruling of the District Court was an adjudication that petitioner has failed to state a cause of action under paragraph (20) of Section 1 of the Transportation Act of 1920, and therefore is a final ruling and order from which an appeal can be taken.

As will be brought out throughout the remainder of this reply brief, both the District Court and the intermediate appellate court have ruled upon but one question. That question is whether or not petitioner Kansas City, Missouri, has a cause of action under paragraph (20) of Section 1 of the Transportation Act of 1920. Whether or not petitioner Kansas City has a cause of action under that Act depends upon the question of whether or not Kansas City is a "party in interest" under that Act. Both the District Court and the intermediate appellate court specifically ruled and decided that petitioner did not have a cause of action under said Transportation Act because it was not a party in interest within the

meaning and intent of that Act. This ruling of those two courts is clearly on the merits of the asserted cause of action of petitioner. It is a final adjudication from which an appeal can be taken. Such a ruling is a final determination of the cause and if allowed to stand makes *res judicata* the question of whether petitioner has alleged a cause of action under paragraph 20, Section 1 of the Transportation Act of 1920. The order did not provide that the dismissal of petitioner's intervening petition was without prejudice, nor can any such meaning be read into it.

Respondent Union Pacific Railroad Company urges for the first time now that the District Court exercised a discretion in refusing to allow petitioner to intervene notwithstanding the inescapable fact that said court ruled that petitioner was not a party in interest under the Transportation Act so as to maintain the action. This contention of respondent is utterly unsound. The District Court, in ruling that petitioner Kansas City, Missouri, had no cause of action under the Transportation Act because it was not a party in interest within the meaning of that Act, became bound in law to dismiss petitioner's motion and petition. If petitioner had no cause of action under said Transportation Act, the trial judge had no discretion in the matter at all, and after such a determination, could not go into the question of whether or not petitioner had, as it claimed, an absolute right to intervene, or had only a permissive right to intervene. The ruling of the District Court was to the effect that it had no discretion at all to exercise, for if petitioner had failed to state a cause of action, no intervention could be allowed under any circumstances, and there could be no consideration—no exercise of discretion—as to whether or not the petitioner could intervene. The ruling of the

District Court was that petitioner Kansas City, Missouri, was not a party in interest under the Transportation Act, and therefore did not have a cause of action. Under that ruling, petitioner could not maintain an independent action of its own. Naturally under such a ruling petitioner could not intervene in any other action. Upon that theory the trial court saw no need to determine *any* further question when it had already determined that petitioner had failed to state a cause of action. The rule is well established that where a trial court refuses to exercise its discretion for the reason that it considers that it has no power to do so, such refusal is error from which an appeal may be taken. *Mattox* v. *United States*, 146 U. S. 140, 138 S. Ct. 50; *Felton* v. *Spiro*, (C. C. A. 6th) 78 Fed. 576.

We think it too clear for argument that if this appeal were here dismissed the petitioner would not then be able to go back and file in the District Court a new proceeding independent of L. Singer & Sons *et al.* without being met with a bar of prior adjudication, because the question of the right of this petitioner to maintain an action under the facts alleged has been finally determined by the District Court and affirmed by the Circuit Court of Appeals for the Eighth Circuit.

III.

Respondent, by proceeding upon the theory (as have both lower courts) that the action of the District Court was a final adjudication of the question of whether or not petitioner has stated a cause of action under paragraph (20) of Section 1 of the Transportation Act, has bound itself to that theory and cannot now abandon that theory and course of conduct and attempt at this time to urge a decision upon this new and conflicting theory.

(A) Analysis of pleadings, briefs and courts' action below.

In the motion of Kansas City, Missouri, for leave to intervene as plaintiff (R. 5), Kansas City alleged that it had the unconditional right to intervene under Section 1, paragraph (20) of the Interstate Commerce Act of 1920. Kansas City further alleged that it had the unconditional right to intervene under the Judicial Code, Sections 212, 213 Amended (Title 28, U. S. C. A., Section 45a). Petitioner further stated therein that it had an absolute right to intervene because petitioner's representations by existing parties were or may be inadequate and that petitioner was or may be bound by judgment in the action. Petitioner then stated that if those statutes do not confer an unconditional right to intervene, petitioner had a conditional right to intervene because the main action and petitioner's claims had questions of law or fact in common and the intervention would not unduly delay or prejudice the adjudication of the rights of the original parties thereto. The remainder of petitioner's motion and its intervening petition stated the petitioner's cause of action under paragraph 20 of Section 1 of the Transportation Act of 1920, which allows any party in interest to bring suit to enjoin a railroad from constructing or operating an extension without having first secured a certificate of convenience and necessity from the Inter-

state Commerce Commission therefor. Respondent Union Pacific Railroad Company then filed its answer (R. 18). This answer challenged the original petition on its merits.

While respondent filed no pleading directed against petitioner's motion to intervene or its proposed intervening petition, the respondent Union Pacific Railroad Company concedes that petitioner's motion to intervene and intervening petition includes all of the allegations of the original complaint of L. Singer & Sons *et al.* (Respondent's brief, pages 4, 7). The District Court ruled and treated the answer of respondent filed in the original proceeding as in effect the answer to petitioner's motion and its intervening petition. Respondent in its answer contended, first, that the District Court had no jurisdiction over the subject matter of the proposed action averred in the complaint of L. Singer & Sons (Case No. 34); second, that plaintiffs (L. Singer & Sons *et al.*) are not parties in interest under the provisions of paragraph (20) of Section 1 of the Commerce Act; third, that the complaint of L. Singer & Sons *et al.* failed to state a claim upon which relief could be granted; fourth, a general denial, with certain allegations of the petition excepted therefrom.

Respondent Union Pacific Railroad Company then filed an application to the court to hear and determine before trial the first three defenses of its answer (R. 22). The application of respondent was granted as revealed by the decree (R. 23). The court, treating this answer and the defenses raised therein as going to the motion of petitioner for leave to intervene and to petitioner's intervening petition, held: First, that it had jurisdiction in the matter; second, that plaintiffs (L. Singer & Sons *et al.*) are not parties in interest, and therefore their complaint failed to state a claim upon which any relief

could be granted; and third, that petitioner Kansas City, Missouri, *"is not a party in interest authorized to maintain* or intervene in *said action"* and therefore its motion to intervene was denied and its complaint dismissed at the cost of plaintiffs (Italics ours) (R. 23).

The District Court in its memorandum opinion (R. 25 at 27) ruled that there was but one question in the case as appears from the following language:

> "The complaint and motion to intervene disclose that neither plaintiffs, nor the City of Kansas City, Missouri, are engaged in the transportation business. It further appears that neither the property or confines of either are touched, encroached upon or directly affected by the proposed construction of the so-called 'extensions.' *There is no violation of any definite legal right alleged. Therefore, neither plaintiffs nor the City of Kansas City, Missouri, may maintain this action.* (Citations.) Since neither the United States, the Interstate Commerce Commission, the Public Service Commission of Missouri or Kansas, or any party directly interested is a party plaintiff to this action it may not be maintained and must be dismissed and the motion to intervene denied. (Sec. 1, par. 20, Title 49, U. S. C. A., *supra.*)" (Italics ours.)

Thus, clearly the District Court has ruled adversely upon the merits of Kansas City, Missouri's, contention that it is a party in interest under paragraph (20) of Section 1 of the Transportation Act of 1920 and as such it has the right to enjoin respondent Union Pacific from constructing or operating an extension without respondent first having secured a certificate of convenience and necessity therefor. *The trial court ruled that Kansas City, Missouri, under paragraph 20 of Section 1 of the Trans-*

portation Act, had asserted no cause of action. (Italics ours.)

L. Singer & Sons *et al.* then appealed on the ground that they were parties in interest under paragraph (20) of Section 1 of the Transportation Act (R. 24). Petitioner appealed from the District Court's ruling that petitioner was not a party in interest under that Act so as to be authorized to maintain or intervene in the action, and from the ruling dismissing the complaint (R. 25).

On November 7, 1939, the cause came on regularly for hearing in the intermediate appellate court (R. 32). After hearing the case on appeal, the Eighth Federal Circuit Court of Appeals, in its majority opinion, stated:

> "The appeals challenge (1) the action of the court in considering in advance of trial the defenses sustained; (2) the ruling that the plaintiffs and the City are not 'parties in interest'; and (3) the ruling that the complaint fails to state a claim upon which relief can be granted."

The majority opinion then said that since they (the writers of the majority opinion) conclude from both the complaint of L. Singer & Sons "and the complaint in intervention tendered by the City that the plaintiffs and the City are without capacity to maintain the suit and that therefore no relief could be afforded them, the court below was justified in entering a decree of dismissal in advance of trial" (R. 34).

The majority opinion next stated:

> "The vital question in these cases is whether the plaintiffs and the City are 'parties in interest' within the meaning of paragraph (20), Sec. 402 of the Transportation Act * * *."

The Court, after setting out the two petitions and motion, then said:

> "It is the plaintiffs' contention that any one whose welfare is adversely affected or threatened by the unauthorized extension of a railroad is a 'party in interest' who may maintain such a suit as this. The defendant, on the other hand, contends broadly that no one is a 'party in interest' who cannot point to the violation of some legal duty owing by the railroad to him. *We concern ourselves only with the question whether the plaintiffs and Kansas City, Missouri, are 'parties in interest' within the meaning of the statute authorizing 'any party in interest' to maintain such a suit.*" (Italics ours.)

Likewise, Judge Kimbrough Stone, in his dissenting opinion, considered the case as involving this sole question.

In the brief of respondent Union Pacific Railroad Company, filed in the Eighth Federal Circuit Court of Appeals, respondent's entire argument went to the question of whether or not Kansas City, Missouri, had a right of action or cause of action under the statutes relied upon by petitioner Kansas City, Missouri. (Note particularly conclusion, page 39, and summary of respondent's contention, page 7 of brief of respondent filed in Eighth Federal Circuit Court of Appeals.) Nowhere in that brief did the respondent make any contention or any mention that petitioner Kansas City had no right to appeal from the order of the District Court. Nowhere in that brief did respondent make any contention or suggestion that the District Court's action in regard to petitioner's motion to intervene and its intervening petition was not appealable. Nowhere in that brief did respondent contend or suggest that petitioner's rights were not finally adjudicated by the District Court's action. On the contrary,

respondent went under the assumption and acted on the premise that the action taken by the District Court with respect to petitioner's motion and intervening petition was appealable, and respondent concerned itself solely with the question of whether or not the District Court was in error in ruling that the Transportation Act failed to give petitioner Kansas City, Missouri, a cause of action. Respondent failed to file a motion to dismiss the appeal of petitioner as it undoubtedly should have done if it had entertained any question as to petitioner's right to appeal.

Petitioner next filed in this Court its petition for writ of certiorari to the Eighth Federal Circuit Court of Appeals, alleging therein that the Eighth Circuit Court of Appeals by its majority opinion was in error in ruling and in sustaining the ruling of the District Court that petitioner was not a "party in interest" under the Transportation Act and that, therefore, the petition failed to state a cause of action and that the petition should be dismissed (page 10, petitioner's petition for writ of certiorari; page 17).

In the brief of respondent Union Pacific Railroad Company in opposition to petition for writ of certiorari of petitioner, respondent likewise confined itself to the single question of whether or not petitioner was a party in interest under paragraph (20) of Section 1 of the Transportation Act so as to be able to maintain the action. Respondent at no time made any contention in that brief that the order of the District Court, denying petitioner's motion to intervene and dismissing the petition, was not appealable.

In said brief, respondent, in making its summary of the opinion of the intermediate appellate court, said:

> "The Court of Appeals, affirming the order of the District Court, held that petitioner was not a 'party in interest' within the meaning of paragraph (20) who could maintain this action."

In the same brief, on page 8, in summarizing that opinion, respondent said:

> *"The Court held that petitioner had not sustained legal injury which would give it the right to complain,* and accordingly affirmed a decree of the District Court *dismissing the complaint and denying petitioner's motion because it had not sustained any legal injury."* (Italics ours.)

From the foregoing it is clear that respondent Union Pacific Railroad Company has entered into the presentation of this case to the intermediate appellate court and to this Court in its brief in opposition to the petition for writ of certiorari upon the theory that the only question for determination was whether or not, on the pleadings of petitioner filed in the District Court, petitioner was a party in interest under paragraph (20), Section 1 of the Transportation Act so as to have a cause of action against respondent. Respondent cannot now at this late date abandon its own theory and cause of action which has been accepted by the intermediate appellate court and relied on in this Court in opposing the issuance of its writ of certiorari.

This Court held in the case of *Lynch* v. *The United States,* 292 U. S. 571, 54 S. Ct. 840, that where an action was brought in the lower court to recover money under a war risk insurance policy and the defendant therein failed to call to the court's attention the fact that the very act which created the rights under that policy limited the bringing of an action thereunder to five (5) years

after the breach thereof, that defense could not be raised in this Court even though the contention is that it goes to the question of whether or not the plaintiff stated a cause of action. This Court said, on page 587 and page 588 of its opinion:

> "*Seventh.* The Solicitor General concedes that in No. 861 no question is presented except that of jurisdiction dependent upon the construction of the Clause in Sec. 17 of the Economy Act discussed above. He contends in No. 855, that if jurisdiction is entertained, the demurrer should be sustained on the ground that the complaint fails to set forth a good cause of action, since it fails to show that the suit was brought within the period allowed by law. This alleged defect was not pleaded or brought to the attention of either of the courts below. Nor was it brought by the Solicitor General to the attention of this Court when opposing the petition for a writ of certiorari. We do not pass upon that question, which like others relating to the merits, will be open for consideration by the lower courts upon the remand."

This Court also discussed, at page 589 of its opinion, the question of whether or not certain recently enacted statutes had any bearing upon the cause. As to them, this Court said:

> "The provision in the Act of March 27-28, 1934, was enacted after the filing in this Court of the petitions for certiorari, but before the writs were granted. As neither of these Acts was referred to by the Solicitor General or by counsel for the petitioners, we assume that there is nothing in them, or in any action taken thereunder, which should affect the disposition of the cases now before us. Any such matter also will be open for consideration by the lower courts upon the remand."

See also:

Delaware, etc., Railroad v. *Koske*, 279 U. S. 7, 49 S. Ct. 202.

Thus this Court has recognized that by failing to raise a particular defense in the intermediate appellate court and in the brief filed in this Court in opposition to the petition for writ of certiorari, the particular defense will not be considered by this Court, but may be considered by the District Court in the event the case is remanded. Particularly should that be true where the District Court, by the nature of its ruling, has not yet considered the question of whether or not petitioner has the absolute right to intervene or only a discretionary right to intervene for the reason that the District Court determined erroneously that, inasmuch as petitioner had no cause of action, its motion and petition must be dismissed. The District Court may well go into the question of absolute and permissive right to intervene upon the remanding of this cause to it, and in fact that will be the first time that it will ever have considered this question.

IV.

The cases respondent cites as holding that the action of the District Court in denying petitioner's motion to intervene and dismissing its intervening motion and petition is not appealable actually hold that such action is appealable.

The cases cited by respondent reveal that the action of the District Court here in question is appealable. Respondent cannot deny that the action of the District Court amounted to an adjudication on the merits of petitioner's cause of action. Petitioner can appeal from such adjudication. Further, the cases cited by respond-

ent, and which respondent states deal with the right to appeal where the Court refused intervention as a matter of discretion, reveal that there are three situations where such an order refusing permissive intervention is appealable. Those situations are:

First: Where the District Court treats the petitioner as having intervened even though the intervention was never allowed as of record. Respondent's own case of *Ex parte Cutting*, 94 U. S. 14, held that mandamus will not lie to control the discretion of a District Court in refusing or granting an order to intervene or to compel it to allow an appeal from such proper exercise of its discretion to a person not an original party to the suit unless it appears that the person's petition to be allowed to intervene was granted *or that said person acted or was treated as a party.* (Italics ours.) On page 20 of its opinion, the Court said:

> "We are aware that there are cases in which persons have been treated as parties to a suit after having filed a petition for leave to come in, when no formal order admitting them appears in the record, but in all such cases it will be found that they have acted or have been recognized as parties in the subsequent proceedings in the case. Thus, in *Myers* v. *Penn*, 5 Wall. 205, 'the petitions were filed without any order of the court, but no objection was made, and the hearing went on as if an order had been granted;' and in *Harrison* v. *Nixon*, 9 Pet. 491, *'inquiries were made as to the respective claims'* as asked for, and *'as to all parties who were claimants before the court by bill, petition, or otherwise,* their complaint, petition, and proceedings were dismissed.'" (Italics ours.)

"* * While it is not necessary for him (petitioner) to show that he has actually been admitted by

an express order entered upon the record, he must at least make it appear that he has acted or has been treated as a party."

Second: Respondent also cites *City of New York* v. *New York Telephone Company*, 261 U. S. 312. The facts of that case are entirely different from those here, but in ruling upon those facts, this Court, on pages 316, 317 of its opinion, recognized that an appeal may be taken from such an order to determine whether or not, if the trial judge were exercising a discretionary right in ruling upon a motion to intervene, he had abused that discretionary power. The Court said:

> "There is nothing to show that the refusal complained of was an abuse of discretion. * * *"

The Court next cites three (3) of the cases cited herein by respondent: *Ex parte Cutting*, 94 U. S. 14; *Credits Commutation Co.* v. *United States*, 177 U. S. 311; *Ex parte Leaf Tobacco Board of Trade*, 222 U. S. 578, and says:

> *"These cases show that exceptional circumstances may make an order denying intervention in a suit a final and appealable order, but the present is not one of them."* (Italics ours.)

Third: Respondent cites *Credits Commutation Co.* v. *United States*, 177 U. S. 311. In this case, in determining whether or not petitioners had the right to appeal from an order refusing intervention, this Court determined whether or not the order of the District Court had adjudicated any of the petitioners' rights asserted in their petition as if upon a demurrer thereto. On page 314 of the opinion, this Court said:

> "It is urged that the Circuit Court declined to treat the subject as of one of discretion, and elected to determine the legal rights of the petitioners, * * * and that, therefore, its judgment was a final one and properly reviewable on appeal."

This Court held that inasmuch as the Circuit Court of Appeals itself in its opinion had not treated the order as being a final determination of the merits of the claim on which the intervention is based, but left the petitioner at full liberty to assert his rights in any further order of proceedings, that such order lacked the finality necessary to support an appeal.

This Court said that since the Circuit Court of Appeals had treated it in that light, and since it (the Supreme Court) thought that said Circuit Court of Appeals had treated it in the proper manner, the appeal could not be taken. In other words, this Court has recognized as a converse that if an order is made which has been treated by the Circuit Court of Appeals and by the parties as being a final order, and it is in fact a final order, an appeal lies from that order.

Respondent has fallen into the error of taking the language of a headnote or the broad language of the particular case as being all-inclusive and meant to apply to any and every factual situation, whereas an analysis of each case cited by respondent reveals that the particular ruling was intended to apply only to the special facts of that case. This Court recognized in every case cited by respondent that where the order of the District Court considers and decides the merits of the petition of the intervener, an appeal lies from such order.

Although petitioner does not wish to burden this Court with further citations, appeals are also allowed from a denial of a motion to intervene where the right of inter-

vention is discretionary where, first, it is clear from the pleadings and the proceedings that the District Court has abused its discretion in denying the intervention; second, where the District Court, under a mistake of law, erroneously rules that it has no discretion to permit intervention and refuses intervention on that basis solely, when in fact under the law it does have such discretion. *Mattox* v. *United States,* 146 U. S. 140; *Felton* v. *Spiro,* 78 F. 576. Further, it is obvious that the intermediate appellate court must have jurisdiction to decide whether or not the District Court erred in its ruling, if it should make one, that the claimed right of intervention was not an absolute right of intervention, but only one that rested in the discretion of the trial court. *Shepherd* v. *St. Louis Public Service Co.,* (C. C. A. 8th) 64 F. (2d) 612; *Universal Ins. Co.* v. *Old Time Molasses Co.,* (C. C. A. 5th) 46 F. (2d) 925. In the latter case, the Court said:

> "The appellees cannot complain of the absence of a formal order permitting the filing of the petition of intervention, as they excepted to that petition on its merits, and thereby evoked a decision of the court having the effect of a denial of any relief sought by the appellant. *In re Cutting,* 94 U. S. 14; *Texas & Pacific Co.* v. *Cox,* 145 U. S. 593, 603."

V.

Conclusion.

The ruling of the District Court that petitioner was not a party in interest under paragraph (20) of Section 1 of the Transportation Act and therefore could not maintain the action, was a ruling that petitioner had failed to state a cause of action. This ruling is of such a binding and final nature as to be clearly one from which

an appeal can be taken. It did not involve the exercise of any discretion by the District Court. Further, by proceeding in the intermediate appellate court and in this Court in its brief in opposition to the petition for writ of certiorari, upon the theory that the action of the District Court with regard to petitioner was an adjudication that petitioner had no cause of action under said Transportation Act, respondent must confine itself now to the submission of that question alone, and if it has other questions which it deems are pertinent, must wait until the cause is remanded to the District Court and raise them as of that time.

Respectfully submitted,

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